1989

State of Utah v. John Quas : Reply Brief of Appellant

Utah Court of Appeals

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...MENT

...CKET NO. 890601CA IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JOHN QUAS,	:	Case No. 890601-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Criminal Homicide, Murder in the Second Degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

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SUMMARY OF ARGUMENT

In addition to relying on and reasserting the contents of his opening brief, Mr. Quas replies to Appellee's Brief as follows:

Mr. Quas maintains that the district court had jurisdiction to quash the improper bindover in this case.

Given the confusion in the district courts concerning jurisdiction over bindover quashal prior to the Gordan, Humphrey, and Mathews opinions, the continuing uncertainty of the conclusion reached in the Gordan, Humphrey, and Mathews opinions, and Mr. Quas' position that bindover quashal lies within the jurisdiction of the district courts, this Court should address the merits of Mr. Quas' successive preliminary hearing/due process argument.

In reviewing the merits of the due process issue, there are two relevant questions before this Court: 1) what is the standard for reversing the dismissal of informations for insufficient evidence? and 2) did the State meet this standard?

The State's proposed standard leaves the discretion for

refiling informations with the prosecutors, and thus violates the fundamental intent of the Brickey decision.

Applying the correct standard for reversal of dismissals (requiring new or previously unavailable evidence that has surfaced, or other good cause) in this case leads to the conclusions that the prosecution did not meet the standard, and that the reversal of the dismissal order in this case violated Mr. Quas' right to due process of law.

The State's profile evidence and argument that Susan Quas was murdered because other suicide victims behave differently than she did were plain error. Even if the State's experts were qualified to render their opinions that it was unlikely that Susan Quas committed suicide because she did not fit within the behavioral profile of suicide victims, the opinions should have been excluded because the prejudicial impact of this testimony outweighed its probative value.

In reviewing the admission of Mr. Quas' custodial statements, the trial court failed to apply Utah Constitutional law relied on by Mr. Quas, apparently following the prosecutor's argument that the State Constitutional precedent was superseded by Federal Constitutional law promulgated by federal courts.

After correcting the trial court's error of law in finding federal precedent controlling over Utah Constitutional precedent, this Court should apply the proper Utah standard and find that Mr. Quas' custodial statements were taken in violation of his right against self-incrimination.

The State's arguments that Mr. Quas' statements to police officers, presented in the State's case-in-chief, were impeachment evidence; that this issue was waived; and that the admission of the statements was rendered harmless by the admission of the statements themselves and other evidence are incorrect.

When read in context, Susan Quas' statements that the police would one day come to the Quas residence to find that Mr. Quas had killed her, and that Mr. Quas was the guilty one do not reflect a state of mind sufficiently relevant to Mrs. Quas' behavior on the night of her death to justify the enormously prejudicial impact of their admission.

Mr. Quas was entitled to have the jury instructed correctly on his theory of the case and the applicable law.

ARGUMENT

I. DISTRICT COURTS HAVE JURISDICTION TO QUASH IMPROPER BINDOVER ORDERS.

Mr. Quas stands by his argument that district courts have jurisdiction to quash bindover orders.[1] While this Court's opinions in the Gordan, Humphrey, and Mathews cases rule otherwise, a petition for certiorari will be filed in the Utah Supreme Court in those cases.

II. THIS COURT SHOULD REACH THE MERITS OF THE IMPROPER BINDOVER ISSUE.

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1 See Point II of Appellant's opening brief.

At the time the trial court in the instant case ruled that it did not have jurisdiction over the magistrate's bindover order, there was a good deal of confusion in the district courts over the jurisdictional question. See petition for interlocutory appeal filed in State v. Gordan, Case No. 890130 (appending three different district court rulings on the issue).

Citing Utah Code Ann. section 78-2-2(3)(h) (Supp. 1989), and State v. Schreuder, 712 P.2d 264, 270 (Utah 1985), the State claims that Mr. Quas should have sought an interlocutory appeal from the bindover order in the Utah Supreme Court.[2] While that code section does provide Utah Supreme Court jurisdiction over "interlocutory appeals from any court of record involving a charge of a first degree or capital felony,", the magistrate who issued the bindover order was not acting as a court of record in presiding over the preliminary hearings.[3] While Schreuder does contain language indicating that the Utah Supreme Court's interlocutory appeal jurisdiction "governs" appeals from bindover orders, the language is dicta.[4]

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2 Appellee's brief at 12-13.

3 See Van Dam v. Morris, 571 P.2d 1325, 1327 (Utah 1977)(magistrate is separate statutory jurisdiction, and those acting as magistrates do not invoke the jurisdiction of other (i.e. circuit) courts); Utah Code Ann. section 78-1-1; 78-1-2 (omitting magistrates from enumeration of courts of record).

4 In Schreuder, the defendant claimed that because his preliminary hearing took place in the trial court, he was deprived equal protection of the law because he did not have a higher court to go to for review of the bindover order. The Supreme Court reviewed the bindover order, thus ensuring him equal protection of the law. The court apparently was not faced with nor reached the question of its jurisdiction to do so.

Mr. Quas maintains that the district court should have exercised its jurisdiction to quash the improper bindover order, and that this Court should both clarify the jurisdictional issue and address the propriety of the bindover order in this case.

III.
THE STATE FAILED TO MEET THE PROPER STANDARD FOR REVERSAL OF THE INITIAL DISMISSAL OF THE INFORMATION.

Mr. Quas, after analyzing and quoting extensively from the Brickey decision and cases cited therein, proposed as the standard for reversal of dismissals of informations based on insufficient evidence the following: "[T]he prosecutor [must] show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling."[5] It is Mr. Quas' position that when the refiling of the information is based on new or previously unavailable evidence, "new or previously unavailable" means evidence that was not available to the State at the first preliminary hearing.[6]

The State apparently would have this Court adopt the standard allowing reversal of dismissals of informations when the prosecution presents "such evidence that with due diligence could have been available at the first preliminary examination."[7]

The Harper language quoted by the State in support of

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5 Appellant's opening brief at 15 through 21, quoting State v. Brickey, 714 P.2d 644, 647 (Utah 1986)(emphasis added).

6 Appellant's opening brief at 17.

7 Appellee's brief at 15, quoting Harper v. District Court, 484 P.2d 891, 897 (Okla. 1971).

its proposed standard for refiling appears to contain a typographical error (missing the word not, provided in brackets below), particularly when read in context,

> We point out further, that the Jones v. State, supra, decision does not preclude the district attorney from offering for further consideration - a charge - which was dismissed at an earlier preliminary examination, when additional newly discovered evidence is later obtained; meaning however, such evidence that with due diligence could [not] have been available at the first preliminary examination. That decision merely requires that the prosecutor may not take his dismissed case - with the same evidence - refile it - and submit it to a magistrate more likely to be favorable. That decision requires that the first magistrate, who considered the information and evidence; and rendered a decision; shall consider the good cause offered and the new evidence, in relation to that upon which his earlier decision was premised. In short, for good cause shown, and subject to the presentment of new evidence, the charge may be refiled.

Harper, at 897. Subsequent Oklahoma case law on the standard for refiling informations supports Mr. Quas' reading of Harper. See e.g., Stone v. Hope, 488 P.2d 616, 620 (Okl.Cr. Sept. 1, 1971)("At the outset of such a preliminary the State has the burden to convince the examining magistrate that there is additional new evidence not presented and unavailable at the previous preliminary which requires re-examination of the dismissal.")(emphasis added); Chase v. State, 517 P.2d 1142, 1143-1144 (Okla.Cr. 1973)(We stated in that case [Jones] that 'new' or 'additional' evidence does not mean that which was known to the State at the time of the first preliminary or that which

could have been easily acquired by it. 481 P.2d at 171....The magistrate must decide if the substance of the new evidence offered is sufficient to overcome the prior dismissal and whether the State has shown good cause why that evidence was not available to it at the first preliminary hearing.")(emphasis added).

Assuming that the State's interpretation of the Harper opinion were the governing standard in Oklahoma, such a standard would grant prosecutors completely unbridled discretion to refile cases, and would directly contradict the Brickey court's explicit intention to remove discretion for refiling cases from the prosecution.[8]

Additionally, the holding of the Harper case relied on by the State is not applicable to refiling informations, but instead provides guidance for granting continuances in those preliminary hearings where prosecutors innocently miscalculate the quantum of evidence necessary to make a showing of probable cause and have evidence reasonably available to present at the continuation without causing undue delay.[9] Even if the Harper

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8 Brickey, 714 P.2d 644, 647 (Utah 1986).

9 The Harper court explained,

> [I]n the event the prosecutor miscalculates and fails to present sufficient evidence to show probable cause to bind over the accused, but possesses other witnesses whose testimony would strengthen his showing, it is clearly within the discretion of the examining magistrate to grant the state a continuance for that purpose. However, it is presumed that the additional witnesses, or

continuance standard were applicable to cases involving refilings, it is inapplicable in this case, which involved a prosecutor consciously refusing to present the pivotal gunshot residue evidence requested by the magistrate to support probable cause (T.814 2-5, 7), rather than a prosecutor innocently miscalculating the necessary quantum of evidence.[10]

The State's characterization of Mr. Quas' proposed standard as a standard requiring new evidence to "jump out of the bushes",[11] presents an unduly limited reading of the Brickey standard, which allows refiling when the prosecution presents new evidence or other good cause for refiling. Brickey, 714 P.2d at 647. In cases in which the State is unable to meet the new evidence prong of the Brickey refiling standard,[12] the State has the opportunity to make a showing that other good cause exists for refiling.

> other evidence, are reasonably available; and that a continuance will not be sought in order to conduct further investigation seeking that evidence, in a dilatory manner.

Harper v. District Court of Oklahoma County, 484 P.2d 891, 892 (Okla. Cr. April 21, 1971).

10 The Brickey court properly noted the application of that Harper rule to continuances to accommodate prosecutors innocently miscalculating the quantum of evidence necessary. Brickey, 714 P.2d 644, 647 n.5 (Utah 1986).

11 Appellee's brief at 14.

12 The only evidence presented in this case by the State that was unavailable at the first preliminary hearing was the testimony of Kristine Knudson, which showed inconsistencies in Mr. Quas's statements, which inconsistencies the magistrate had already noted at the first preliminary hearing. See Appellant's opening brief at 23-24.

The State's effort to assuage the Brickey due process violation by arguing that the magistrate was wrong in her original dismissal of the information for lack of evidence[13] is neither the proper mode of challenging the magistrate's dismissal nor relevant to this appeal.[14]

IV.
THE ADMISSION OF THE EXPERT TESTIMONY CONCERNING THE BEHAVIORAL PROFILE OF SUICIDE VICTIMS WAS PLAIN ERROR.

In State v. Braun, 128 Utah Adv. Rep. 45 (Utah App. 199Ø), this Court explained that the plain error doctrine is used as a tool to see that justice is done, in the following manner:

> We note that the two plain error requirements of obviousness and harmfulness are related and that the obviousness requirement poses no rigid and insurmountable barrier to review. For example, the more harmful an error is, the more likely an appellate court is to conclude that it was objectively obvious, because a high degree of harmfulness might be expected to attract a trial court's attention. On the other hand, in appropriate cases we can exercise our discretion to dispense with the requirement of obviousness, so that justice can be done, as when an error not readily apparent to the court or counsel proves harmful in retrospect.
>
> ... At bottom, the plain error rule's purpose is to permit us to avoid injustice. No statement of the factors that are important to our deliberations on the point should be read to limit our power to achieve

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13 Appellee's brief at 16, n.5, 17-2Ø, 25.

14 See Utah Rule of Criminal Procedure 26(3)(a) (providing State an appeal from dismissal); Boggess v. Morris, 635 P.2d 39, 42 (Utah 1981)(prosecution may resort to extraordinary writ if information is improperly dismissed).

that end.

Id. at page 49, quoting State v. Eldredge, 773 P.2d 29, 35 n.8 (Utah 1989), cert. denied, 110 S.Ct. 62 (1989).

The admission of the expert testimony and argument that Susan Quas was murdered because her behavior did not fit the profile of suicide victims was obvious error - it violated both Utah Rule of Evidence 702 and 403. Neither Dr. Grey nor Mr. Marchant was qualified to present expert testimony on the behavioral profile of suicide victims, and even if the proper foundation had been laid, such testimony was unduly prejudicial, given its lack of probative value. Compare the evidence and argument in this case with the facts and rulings in State v. Rammel, 721 P.2d 498 (Utah 1986)(the police officer in the Rammel case should not have presented testimony concerning a profile of the behavior of criminals and the defendant's fitting that profile, because of his lack of qualification and because the statistical, or profiling evidence was not sufficiently probative to outweigh its prejudicial effect); and State v. Rimmasch, 776 P.2d 388, 403 n.13 and 401-403 (Utah 1989)(citing Rammel to explain that profile evidence on behavior of typical abused children is improper because it has "a tendency to mislead and confuse a finder of fact by suggesting that the issue to be decided is whether the accusing child possesses these characteristics rather than whether the child experienced the specific instances of abuse described"; and discussing the heavy foundational burden that precedes the presentation of expert

profiling testimony).

The prosecution's heavy reliance on the improper profiling testimony (T. 184-185, 890, 907-908, 945-946)[15] underscores the harmful nature of its admission, and suggests that this Court should exercise its discretion under the harmless error doctrine to correct the trial court and reverse Mr. Quas' conviction. Braun, supra.

V.
THE CARNER DECISION GOVERNS THE SELF-INCRIMINATION ISSUE IN THIS CASE.

A. IN ADOPTING THE STATE'S POSITION THAT FEDERAL PRECEDENTS SUPERSEDED A CASE DECIDED UNDER THE UTAH CONSTITUTION, THE TRIAL COURT VIOLATED A BASIC TENET OF FEDERALISM.

When the issue of Mr. Quas' statements to the police officers was raised in the suppression hearing, Mr. Quas was relying explicitly on Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983)(M.H. 84), which was explicitly decided under Article I section 12 of the Utah Constitution. 664 P.2d 1168, 1172. The prosecutor argued that subsequent federal case law had superseded the Carner opinion, and had repudiated the Carner

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15 On appeal, it is the State's theory that because the expert testimony and argument discussed the "manner of death" of Susan Quas, and did not formally reach the question of Mr. Quas's having murdered Susan, the evidence was acceptable. Appellee's brief at 27 and n. 10.

The State's argument concerning the propriety of the prosecution's discussing Susan Quas's manner of death misconstrues the issue before this Court. There is no question that it is appropriate for the State to present evidence and argument directly on the point of Mr. Quas's guilt. However, attempting to prove that Mr. Quas murdered Susan because she did not commit suicide because she did not fit within the behavioral profile of suicide victims is an improper mode of proof. See Rammel and Rimmasch, supra.

factor relating to the focus of the investigation (R. 439-445; M.H. 88).[16] The trial court apparently believed this argument and focused solely on the absence of indicia of arrest in declining to suppress the statements.[17]

Federal interpretations of federal case law do not supersede state court interpretations of state constitutions. Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984). The federal precedents relied on by the State at trial and on appeal do not overrule Carner, which is a precedent interpreting Article I section 12 of the Utah Constitution.[18]

Aside from this precept of federalism, there is good reason for this Court to maintain the integrity of the Carner decision and its inquiry into the focus of the investigation. As this case demonstrates, if Miranda warnings are only required when guns are drawn and handcuffs are locked, police officers can manipulate the standard, giving warnings only in cases when suspects force their own arrest by physically attempting to leave the police. To extend the length of a pre-Miranda interrogation, a police officer need only avoid formal arrest.

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16 Under Carner, the factors to be considered to determine if a suspect is entitled to Miranda warnings are:

> (1) the site of the interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation.

Id. at 1171 (emphasis added).

17 The trial court's ruling is contained in Appendix 4 of Appellant's opening brief.

18 Carner, 664 P.2d at 1272.

In this case, the police suspected that John Quas had murdered Susan Quas prior to entering or within minutes of entering the Quas residence.[19] Three or four police officers surrounded Mr. Quas, would not let him get up from the kitchen table to get a drink or call a friend, took his car keys away, offered to let him call a friend to come and get him, took him to the police station prior to letting him call the friend, told him he was not under arrest, and interrogated him, all without Miranda warnings, until Officer Edwards began tape recording the interrogation.[20] Officer Edwards indicated at the suppression hearing that the only reason that he gave Mr. Quas the warnings prior to the taped interview was that he was "[b]eing cautious." (M.H. 71).

In the State's only recognition of the Carner case on appeal,[21] the State argues that Mr. Quas was not entitled to Miranda warnings because no police officer said to him, "John Quas, I accuse you of murdering your wife."[22] This argument

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19 Appellant's opening brief 45-48.

20 Appellant's opening brief at 45-47.

21 The State again relies primarily on federal precedents. Appellee's brief at 32-34.

22 The State argues,

> [T]he court [in Carner] elaborated on factors it considered when determining whether an accused who has not been formally arrested is in custody. They are: (1) the site of the interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and

places undue emphasis on the word "accused" in the Carner opinion, which word was merely used as a synonym for person. Focus of the investigation, not formal accusation, is a precursor to Miranda warnings. See Carner factor 2, 664 P.2d at 1171 (focus of the investigation), and Appellant's opening brief at 45 through 50 (showing that Mr. Quas was the focus of the investigation from moments after the investigation began).

This Court should maintain the tradition under the Utah Constitution of providing uniquely broad protection to the right against self incrimination,[23] and reverse the trial court's error

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> (4) the length and form of interrogation. . . .
> ... In light of Carner, it is important to note that here defendant was accused of nothing at the time of his interview with Detective Edwards and that at that time it had not been ascertained yet that a crime had been committed.* Police considered both homicide and suicide as possibilities,* and Dr. Grey had not conducted the autopsy. Defendant was a suspect in the investigation as it related to the possibilities of homicide, but none of the objective indicia of arrest was present (S.H. 76-77)....

Appellee's brief at 34 (emphasis by the State).

*note the absence of supporting record citations.

23 See Carner, supra; State v. Ruggeri, 429 P.2d 969 (Utah 1967)(under Article I section 12 of the Utah Constitution, it was improper to fail to warn a witness at grand jury proceedings that he was the target of the investigation); In Re Criminal Investigation, 754 P.2d 633 (Utah 1988)(under Article I section 12 of the Utah Constitution, in exercising subpoena powers, the attorney general must warn those upon whom the investigation focuses that they are the target of the investigation).

of law in failing to follow the controlling Utah law.[24]

B. MR. QUAS' OBJECTIONS TO THE STATEMENTS TAKEN AT HIS RESIDENCE WERE NOT WAIVED.

The State argues that Mr. Quas has waived his opportunity to object to the statements taken at the Quas residence, and is limited to discussing the statements made at the police station.[25]

Mr. Quas' motion to suppress encompassed "any and all" statements taken in violation of his rights (R. 412). The trial court's legal error in failing to apply the Carner analysis would not have been corrected by further emphasizing the statements made at the Quas residence, and thus seems to moot the waiver argument. Nonetheless, the circumstances at the Quas residence were discussed at the hearing on the motion to suppress.

While at the hearing on the motion to suppress, defense counsel's primary focus was on the statements made to Officer Edwards at the police station, the facts surrounding the interrogation at the Quas residence were discussed by Mr. Quas. Although his memory of the events was poor, he indicated that there were three or four police officers present and that he had spoken with Officer Edwards (M.H. 48-51). Mr. Quas also indicated that prior to leaving the Quas residence, when Officer

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24 This Court owes the trial court no deference in correcting the trial court's error of law. Western Fiberglass v. Kirton, McConkie & Bushnell, 789 P.2d 34, 37 (Utah App. 1990).

25 Appellee's Brief at 29 through 31.

Edwards offered to let him call a friend to pick him up, he did not call the friend because Officer Edwards told him he was going to the police station (M.H. 54). Mr. Quas indicated that Officer Edwards first read him his rights during the interview at the police station (M.H. 55).

Officer Edwards also testified that he spoke with Mr. Quas at his home (M.H. 67). He indicated that Mr. Quas was taken to the police station by Officer Cox (M.H. 74). When first asked if Mr. Quas was free to leave his residence, Officer Edwards indicated that the thought had not crossed anyone's mind, but that he "imagined" Mr. Quas was free to leave. When the prosecutor, in the next question, asked him again if Mr. Quas was free to leave his home and not go to the police station, Officer Edwards indicated that he was (M.H. 68-69).

Officer Edwards indicated that at the Quas residence, prior to Mr. Quas' transportation to the police station, Officer Edwards suspected that Mr. Quas had murdered Susan (M.H. 76), and that Mr. Quas was the strongest suspect in his mind (M.H. 78).

While the trial court's ruling focused primarily on the circumstances at the police station, the trial court did mention that the record was "very unclear" about whether or not the circumstances at the Quas residence prior to Mr. Quas' going to the police department were voluntary.[26]

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26 The trial court's findings state,
...Defendant indicated that he wanted to leave. It would appear, through the record

The language of the motion in limine and the legal and factual issues discussed at the suppression hearing are adequate to preserve this issue for appeal.

However, this Court should further consider the fact that the State did not reveal the strongest evidence of custody (Carner factor 3) justifying suppression of the statements at the Quas residence and at the police station until Officer Spann testified at trial, and indicated that at the Quas residence, he and the other Officers forced Mr. Quas to stay at the kitchen table and did not allow him to get up to get a drink or make a phone call (T. 353, 360).[27] Up until Officer Spann's testimony,

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> is very unclear, that Officer Lamont Cox asked Defendant if he wanted to go to the West Valley Police Station, and Defendant responded in the affirmative.

R. 446 (Appendix 4 of Appellant's Opening Brief).

27 When Officer Spann tried to obtain a transcript of his tape recorded police report made on the night of Susan Quas's death, Officer Edwards told him that he could not find it (T. 342-343). In fact, the report could not be found through subsequent efforts (T. 343).

> The State argues,
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> ....
>
> [A] review of Sgt. Spann's testimony at the preliminary hearing and trial reveals no material differences. Even if Sgt. Spann testified in greater detail at trial, the defense not only had access to his police report before the preliminary hearing but also had ample opportunity to cross examine him then.

Appellee's brief at 10 n. 4.

After Mr. Quas moved to supplement the record with a copy of Officer Spann's police report, this Court indicated that because the report was not presented to the court at trial, reliance on the report on appeal is improper.

In Officer Spann's preliminary hearing testimony (P.H.2 17-23), his only reference to the custodial circumstances of Mr. Quas at the Quas residence again was "Once we were able to get Mr. Quas into the kitchen area..." (P.H. 2 20). See Appendix 2.

The preliminary hearing focused on probable cause,

every other police officer had indicated that Mr. Quas was not physically restrained or detained.[28]

The late revelation of this evidence by the State explains why defense counsel was not aware of the need to further emphasize the statements taken at the Quas residence, and explains why this Court should adopt the order of proof discussed in State v. Crank, 142 P.2d 178, 185 (Utah 1943), and Appellant's opening brief at 42-43.[29]

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rather than admissibility of evidence, and thus did not focus on the custodial nature of Mr. Quas's interrogation on the night of Susan's death. Indeed, after the motion to suppress had been resolved against Mr. Quas, it is a fortunate coincidence that Officer Spann's testimony relating to the custodial nature of Mr. Quas's interrogation was revealed at trial.

28 For example, at the suppression hearing, Officer Edwards indicated that Mr. Quas was free to leave from his residence (M.H. 69) and from the police station (M.H. 72-73). Apparently because the police had seized Mr. Quas's car keys for "evidence" (M.H. 80), Officer Edwards testified that he asked Mr. Quas if he had a friend to come and pick him up at the police station prior to the taped interview (M.H. 70). Officer Edwards testified that he got the telephone number of Mr. Quas's friend, Russ Wagner, out of the phone book, gave the to Mr. Quas, and directed him to call Mr. Wagner up (M.H. 70).

29 The State's effort to distinguish the Crank case by noting that the court chose the word "confession", while Mr. Quas uses the words "custodial statements", Appellee's brief at 37 n.15, perhaps can be resolved by noting that yet a third synonym is used in the constitutional provision interpreted in Crank, and raised explicitly in Mr. Quas's motion to suppress (R. 412), Article I, section 12 of the Utah Constitution: "The accused shall not be compelled to give evidence against himself." (emphasis added).

The State's argument that this Utah Constitutional argument has not been briefed adequately for this Court to address it on appeal, Appellee's brief at 37 n.15, is rebutted through reference to State v. Jewett, 500 A.2d 233 (Vt. 1985), which was cited by the Utah Supreme Court as a "summary of scholarly commentary and analytic technique" in briefing of state constitutional issues. State v. Earl, 716 P.2d 803, 806 (Utah 1986). In Jewett, the court stated,

C. THE STATEMENTS WERE NOT PRESENTED AS IMPEACHMENT, AND THEIR ADMISSION WAS NOT HARMLESS.

The State argues that the statements in question were permissible as impeachment evidence.[30] The State introduced this evidence, as promised in its opening argument (T. 183, 188) as part of its case in chief (T. 241, 287-288, 3Ø5, 338, 375-376, 344, 392, 375-378, 453-46Ø, 474) before Mr. Quas testified (T. 8Ø3-861). In these circumstances, the evidence does not qualify as impeachment evidence under the precedents relied on by the State. E.g. State v. Ayala, 762 P.2d 11Ø7, 1112-1113 (Utah App. 1988)(statements are used to "attack the credibility of defendant's trial testimony", and should be accompanied with jury instructions on limited use of the evidence); Harris v. New York, 4Ø1 U.S. 222 (1971)(statements rendered inadmissible in the prosecution's case-in-chief may be used to impeach the credibility of trial testimony).

Mr. Quas agrees that there is no Sixth Amendment issue before this Court,[31] and to his knowledge, has not raised one.[32]

> When a state constitutional issue is squarely raised on appeal, and it appears the issue has possible merit, if the briefing is inadequate, we will order a rebriefing or address the issue. Otherwise it will seem that we are "decided only to be undecided, resolved to be irresolute, adamant for drift, ... all-powerful for impotence."

Id. at 236, quoting W. Churchill, While England Slept (1938).

3Ø Appellee's brief at 37 through 38.

31 Appellee's Brief at 38 n. 17.

The argument that the admission of the statements to the police officers was harmless error in light of the presentation of the statements themselves and other evidence presented at trial,[33] should be evaluated in light of the emphasis the prosecution placed on the statements in opening and closing argument (T. 183, 188, 894-902), in light of the improper nature of other evidence relied on by the State, and in light of the fact that this constitutional violation requires this Court to find any error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).

VI.
THE ADMISSION OF SUSAN QUAS' STATEMENTS WAS REVERSIBLE ERROR.

The State acknowledges that under controlling precedents, in order to admit Susan Quas' statements that one day the police would come and find her dead, to find that her husband had killed her and was the guilty one, the State should have demonstrated that the statements were probative of "the decedent's state of mind at the time of the killing."[34] However, on appeal, as at trial, the State fails to make the requisite showing. The State argues that the statements were admitted to rebut the claim that Susan Quas committed suicide, but fails to

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32 But see Appellant's opening brief at page 50-51, indicating that once Mr. Quas was informed of his Miranda rights, Officer Edwards violated Mr. Quas's right against self-incrimination, in continuing to interrogate Mr. Quas after Mr. Quas invoked his right to counsel.

33 Appellee's brief at 38.

34 Appellee's brief at 40.

explain how, taken in context, they do so.[35]

As noted extensively in Appellant's Opening Brief, an examination of the contexts in which the statements were made does not support this argument. See Appellant's Brief at 53-56.

The State's claim that the evidence was necessary to rebut the suicide claim raised by the defense,[36] should be evaluated in light of the State's expert testimony that Susan Quas was not a suicidal person (T. 721-735). See State v. Auble, 754 P.2d 935, 938 (Utah 1988).

While the trial court gave repeated instructions on the abstract concept of limited use of evidence,[37] such instructions are not an adequate assurance that the evidence will be limited to its proper use. See State v. Auble, 754 P.2d 935, 937 (Utah 1988); State v. Wauneka, 56Ø P.2d 1377, 1379-1381 (Utah 1977); prosecutor's argument to the trial court that statements were admissible to show the identity of the murderer (T. 278).

VII.
MR. QUAS WAS ENTITLED TO HAVE THE JURORS INSTRUCTED PROPERLY.

Mr. Quas was entitled to have the jurors instructed properly on his theory of the case and the law. State v. Potter,

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35 Appellee's brief at 4Ø.

36 Appellee's brief at 4Ø-41.
Given Susan Quas's proclivity toward guns, drinking, and feigning suicide, and her condition on the night of her death, Mr. Quas's defense was not limited to suicide, but also encompassed the possibility that Susan had an accident (T. 193, 915).

37 Appellee's Brief at 41.

627 P.2d 75, 78 (Utah 1981).

A. FLIGHT INSTRUCTION

The State argues that the trial court was correct in denying Mr. Quas' requested flight instruction because there was no basis for it in the record.[38] At the time of trial, defense counsel had to make the best of the trial court's ruling that Mr. Quas was not in custody and spent the evening with the police voluntarily, and thus sought to establish Mr. Quas' cooperation with the police (T. 360).[39]

Although the State claims that jury instructions 5 through 11 were cumulative to Mr. Quas' requested flight instruction and made it unnecessary for the trial court to give the instruction,[40] a review of those instructions indicates that the instructions do not convey the information in the instruction requested by Mr. Quas. See Appendix 3 to this brief, including instructions 5 through 11.

B. PROOF BEYOND A REASONABLE DOUBT INSTRUCTION

The trial court's "statements" to the prospective jurors concerning the meaning of the beyond a reasonable doubt standard of proof, and the prosecutor's opening argument concerning the beyond a reasonable doubt standard of proof were

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38 Appellee's brief at 43.

39 The absence of explicit argument on point is explained by the trial court's ruling that instructing on the inferences to be drawn from Mr. Quas's failure to flee would be an improper comment on the evidence.

40 Appellee's brief at 43-44.

incorrect statements of the law.[41] Rather than correcting this error by giving the instruction requested by the defense, which instruction is a clear statement of the law, the trial court instructed the jurors that doubt is reasonable when it "is based on reason", when it is "reasonable in view of all the evidence", and when it would be held by "reasonable men and women". Instruction 7. The instruction requested by the defense was more concrete and understandable and should have been given (R. 596). State v. Potter, 627 P.2d 75, 80 (Utah 1981).

CONCLUSION

Because the original dismissal of this case should not have been overturned, this Court should reverse Mr. Quas' conviction, and order the case dismissed. At the least, Mr. Quas is entitled to a new trial comporting with his constitutional rights, and other laws governing fair trials.

Respectfully submitted this 24 day of April, 1990.

LISA J. REMAL
Attorney for Appellant

CANDICE A. JOHNSON
Attorney for Appellant

ELIZABETH HOLBROOK
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that eight copies

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41 See Appellant's Opening Brief at 62 to 65.

of the foregoing will be delivered to the Utah Court of Appeals and that four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah, 84114, this 24 day of April, 1990.

ELIZABETH HOLBROOK

DELIVERED BY _____ this _____ day of April, 1990.

_____

APPENDIX 1
STATUTES AND CONSTITUTIONAL PROVISIONS

TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 78-1-1 (1953 as amended) provides:

> **78-1-1. Courts of justice enumerated.**
> The following are the courts of justice of this state:
> (1) the Supreme Court;
> (2) the Court of Appeals;
> (3) the district courts;
> (4) the circuit courts;
> (5) the juvenile courts; and
> (6) the justices' courts.

Utah Code Ann. § 78-1-2 (1953 as amended) provides:

> **78-1-2. Courts of record enumerated.**
> The courts enumerated in the first five subdivisions [subsections] of the preceding section [§ 78-1-1] are courts of record.

Utah Code Ann. § 78-2-2 (Supp. 1990) provides in pertinent part:

> **78-2-2. Supreme Court jurisdiction.**
> . . . . .
> (3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
> . . . . .
> (h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony.

Utah Rule of Criminal Procedure 26 provides in pertinent part:

> **Rule 26. Appeals.**
> . . . . .
> (3) An appeal may be taken by the prosecution from:
> . . . . .
> (a) a final judgment of dismissal.

Utah Rule of Evidence 403 provides:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rule of Evidence 702 provides:

> **Rule 702. Testimony by experts.**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Article I, § 12 of the Constitution of Utah provides:

> **Sec. 12. [Rights of accused persons.]**
>
> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

APPENDIX 2
OFFICER SPANN'S PRELIMINARY HEARING TESTIMONY

DIRECT EXAMINATION

BY MR. MATHESON:

Q. Please state your full name and spell it for the record.

A. Russell Edward Span, S-p-a-n.

Q. By whom are you employed?

A. West Valley City Police Department.

Q. And what is your position there?

A. I'm a patrol sergeant.

Q. And how long have you held that position?

A. Since April 19th, 1987.

Q. Sergeant Span, on June 15, 1987, did you receive a call to go to the residence of John Quas?

A. Yes, sir, I did.

Q. And did you go to that residence?

A. Yes, sir, I did.

Q. What time did you arrive?

A. 2148 hours. 9:48 p.m.

Q. And after your arrival at the Quas residence, did there come a time when you entered the home itself?

A. Yes, there did.

Q. And upon entry what did you discover?

A. I found Mrs. Quas laying prone in the living room area suffering from a gun shot wound to

the face.

Q. And to your personal knowledge, Sergeant, had any police or paramedics moved the body?

A. No, they had not.

Q. And in fact, Sergeant, what is standard procedure with respect to touching or moving a body under these circumstances?

A. To sustain a live there would be movement of the body; if not, there would be no movement of the body at all to protect the crime scene.

Q. Did you talk with John Quas?

A. Yes, I did.

Q. When did that conversation take place?

A. Approximately three to five minutes after I arrived at the residence.

Q. And where did that conversation take place?

A. First in the hallway in the residence, which was at the top of the stairs, and then in the kitchen area.

Q. Could you describe more specifically the hallway in relation to the rest of the house?

A. Yes. It's a single family residence. On the north side of the road facing south there's a stairway that leads up to their residence, a cement

stairway.

You walk into the residence and it's a split-level residence. You go up the stairs and off the right-hand of the stairway is the living room area and straight ahead is the kitchen area and off to the left is a hallway. I believe there's two bedrooms on the left side of the hallway and one bedroom on the far right end of the hallway and a bathroom on the right side of the hallway.

Q. All right. Now, did Mr. Quas say anything about what he was doing when his wife had been shot?

A. Yes, he did.

Q. And what did he say?

A. He stated that he was in the shower.

Q. And did he say anything else?

A. He stated that he was in the shower and heard the gun shot and came out and found his wife laying on the floor and then contacted 911.

Q. Now, when you talked with Mr. Quas did you have an opportunity to observe his appearance?

A. Yes, I did.

Q. And could you describe his appearance during that time when you were talking to him?

A. He was wearing a long dark robe. It appeared that his hair was wet on the top, but not

soaked to the roots and his hands were extremely dirty.

Q. Did you take an opportunity to observe the hallway?

A. Yes, I did. There was a plastic runner on that hallway and I did not observe any water on that mat down the hallway towards the bathroom.

Q. Did the observations you've just told us about lead you to take any further action?

A. Yes, they did. Once we were able to get Mr. Quas into the kitchen area, I walked down the hallway to the first door on the right, the bathroom area anyway, and went into the bathroom area.

Q. And what did you find there?

A. At that time I observed the floor was dry in the bathroom area and I further observed that the shower area, the bath tub and the side walls, were dry.

Q. And when did this inspection of the bathroom take place?

A. It would have been within 15 minutes after my arrival.

Q. At the residence?

A. Yes.

Q. Do you recall what you did after

inspecting the bathroom?

A. I went back outside into the hallway area, at which time I heard the washing machine going in the basement area. I then went down the stairs to the basement area and found the washing machine running and stopped the washing machine.

Q. And after that happened, did you hear Mr. Quas say anything about the washing machine?

A. Yes. In reference to my stopping the washing machine he stated that he was washing clothes for a vacation that he and his wife were going to take to Nevada.

MR. MATHESON: Thank you, Sergeant. I have no further questions.

CROSS-EXAMINATION

BY MS. JOHNSON:

Q. Sergeant Span, you arrived at the scene -- when you arrived at the scene on June 15th how many other officers were there at that time?

A. Two other officers.

Q. On June 15th you made all of these observations, did you not?

A. Yes, ma'am.

Q. You made the observations concerning Mr. Quas's appearance, did you not?

A. Yes.

Q. Did you write a report about all of this, Sergeant Span?

A. I taped a report.

Q. And when did you do that?

A. That evening.

Q. And did you provide that tape report to Detective Edwards?

A. The tape report was turned into our records division to be transcribed.

Q. All right. And so all of that information was then available on the evening that you observed all of this information at the Quas home, is that correct?

A. I'm not sure I understand. I provided the tape to the records division. However, I found later that the tape was not transcribed.

Q. All right. Now, you testified that you checked the bathroom about 15 minutes after you arrived at the Quas home, is that right?

A. Yes, ma'am.

Q. Okay. Did you observe whether or not there were any windows open in the bathroom?

A. No, I did not.

Q. Do you recall whether there were windows

open in the bathroom?

A. I don't recall.

Q. Do you recall what the temperature was in the home?

A. No, I do not.

Q. Do you recall what the temperature was outside?

A. No, ma'am, I do not.

Q. Could you describe what the weather was like that night?

A. It was warm. It was June 15th. That's the best I can recall.

Q. I didn't catch that last statement?

A. It was June 15th.

Q. June 15th?

A. Yes, ma'am.

Q. Would it be fair to say it was summery weather?

A. Yes, ma'am.

Q. Concerning the observations you made, the washing machine running, all of that was made on June the 15th?

A. Yes, ma'am.

MS. JOHNSON: No further questions.

THE COURT: Mr. Matheson.

MR. MATHESON: No further questions, Your Honor.

THE COURT: You may step down. Your next witness.

MR. MATHESON: Your Honor, I need to check to see if the next witness has arrived.

MS. REMAL: We have no objection to Sergeant Span leaving if he wants to.

MR. MATHESON: I think he may wish to leave, if that's all right with the Court.

MS. REMAL: That's fine.

MR. MATHESON: Thank you. We're going slightly out of the originally intended order, Your Honor.

THE COURT: I knew that we had sworn Detective Edwards but you were looking for someone else. I suspected you were going out of order.

MR. MATHESON: Your Honor, as you'll recall, we marked six exhibits at the last preliminary hearing. I think at this time I would like to move for their readmission.

THE COURT: I don't think you have to do that, do you?

MR. MATHESON: I don't know.

THE COURT: You want to be extra cautious.

APPENDIX 3
JURY INSTRUCTIONS 5 THROUGH 11

INSTRUCTION NO. 5

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the Information filed in this court and the defendant's plea of "not guilty". This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested for this offense, or because an Information has been filed against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the State of Utah and the defendant have a right to demand and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, that you will reach a just verdict regardless of what the consequences of such verdict may be. The verdict must express the individual opinion of each juror.

INSTRUCTION NO. 6

At times throughout the trial the court has been called upon to determine whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. You are not to consider evidence offered but not admitted, nor any evidence stricken out by the court; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

INSTRUCTION NO. 7

All presumptions of law, independent of evidence, are in favor of innocence. A defendant is presumed innocent until he is proven guilty beyond a reasonable doubt. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal.

The burden is on the State to prove the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty. A reasonable doubt is based on reason and common sense and not on speculation or imagination. It is a doubt that is reasonable in view of all of the evidence. Proof beyond a reasonable doubt must satisfy the mind and convince those who are bound to act conscientiously upon such proof. A reasonable doubt is a doubt that reasonable men and women would hold after consideration of the evidence or lack of evidence in the case.

INSTRUCTION NO. 8

Where there is a conflict in the evidence you should reconcile such conflict as far as you reasonably can. But where the conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are. There are no definite rules governing how you shall determine the weight or convincing force of any evidence, or how you shall determine what the facts in this case are. But you should carefully and conscientiously consider and compare all of the testimony, and all of the facts and circumstances, which have a bearing on any issue, and determine therefrom what the facts are. You are not bound to believe all that the witnesses have testified to or any witness or class of witnesses unless such testimony is reasonable and convincing in view of all of the facts and circumstances in evidence. You may believe one witness as against many, or many as against a fewer number in accordance with your honest convictions. The testimony of a witness known to have made false statements on one matter is naturally less convincing on other matters. So if you believe a witness has wilfully testified falsely as to any material fact in this case, you may disregard the whole of the testimony of such witness, or you may give it such weight as you think it is entitled to.

INSTRUCTION NO. 9

You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. In judging the weight of the testimony and credibility of the witnesses you have a right to take into consideration their bias, their interest in the result of the suit, or any probable motive or lack thereof to testify fairly, if any is shown. You may consider the witnesses' deportment upon the witness stand, the reasonableness of their statements, their apparent frankness or candor, or the want of it, their opportunity to know, their ability to understand, and their capacity to remember. You should consider these matters together with all of the other facts and circumstances which you may believe have a bearing on the truthfulness or accuracy of the witnesses' statement.

INSTRUCTION NO. 10

You are instructed that the defendant is a competent witness in his own behalf and his testimony should be received and given the same consideration as you give to that of any other witness. The fact that he stands accused of a crime is no evidence of his guilt and is no reason for rejecting his testimony. However, you should weigh his testimony the same as you weigh the testimony of any other witness.

INSTRUCTION NO. 11

The rules of evidence ordinarily do not permit the opinion of a witness to be received in evidence. However, an exception to this rule exists in the case of an expert witness. An expert witness is a person who by education, study or experience has become an expert in any art, science, trade or profession, and who is called as a witness to give this opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, which are given for it. However, you are not bound by such an opinion. You may give to it the weight to which you deem it is entitled, whether that be great or slight, and you may reject it entirely, if in your judgment the reasons given for it are unsound.